Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	

REPLY IN SUPPORT OF APPLICATION FOR REVIEW OF BUREAU ORDER

MARK L. EVANS
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Telecommunications, Inc.

September 8, 2005

BellSouth respectfully submits this reply in support of its Application for Review of the Wireline Competition Bureau's *July 15, 2005 Order*. AT&T Corp. is the only party that has filed an opposition to BellSouth's Application. Its arguments are without merit.

I. THE COMMISSION'S EQUITABLE JUDGMENT TO MANDATE REFUNDS IS EITHER PROPERLY BEFORE THE D.C. CIRCUIT IN THE PENDING CASE OR PROPERLY BEFORE THE COMMISSION NOW

In BellSouth's view, the Commission's *2004 Order*[1] in these dockets is unlawful because, among other things, it concludes that it would be equitable to require refunds in this case. BellSouth, accordingly, petitioned for review of that decision in the D.C. Circuit and argued that the equitable analysis in that order violated established legal standards.

The Commission responded to that claim by arguing that it had not finally decided whether refunds are equitable and that judicial review of that issue is not appropriate until after the Commission determines the precise amount of refund liability. The Commission's attorneys told the court that it should not review this issue until the Commission "complete[s] its decisionmaking process" by "decid[ing] whether to impose a refund obligation, the amount of that obligation, if any, and *the equitable justifications for that decision*." Brief for Respondents at 39, Nos. 04-1331 *et al.* (filed June 17, 2005) ("FCC D.C. Cir. Br.") (emphasis added).

Importantly, however, the Commission further stated that, "*because the LECs can seek judicial review of any future refund decision*," *id.* at 41 (emphasis added), deferring review until that time would allegedly cause BellSouth no hardship. BellSouth agrees that, if these issues are not reviewable in the pending D.C. Circuit proceeding, they must be reviewable by the D.C. Circuit now that the Bureau has determined a specific refund obligation. Otherwise, BellSouth would have no opportunity to obtain judicial review of the Commission's determination that

---

[1] Order, *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, 19 FCC Rcd 14949 (2004) ("*2004 Order*").

refunds are equitable. And, because Bureau decisions are not directly reviewable by a federal court, BellSouth filed its Application as a necessary step in ensuring D.C. Circuit review.

Unlike the Commission, however, AT&T apparently believes that BellSouth can *never* pursue this equitable issue in the D.C. Circuit. After filing a brief agreeing with the Commission that BellSouth was premature in seeking to raise this issue in the pending court proceeding, *see* AT&T Intervenor's Br. at 23-24, Nos. 04-1331 *et al.* (filed June 21, 2005), AT&T now argues that BellSouth is too late in seeking to raise it now. That position is inconsistent with the Commission's own representations to the D.C. Circuit. Moreover, AT&T invites the Commission to engage in the kind of now-you-see-it, now-you-don't evasion of judicial review that the D.C. Circuit will not tolerate. *See, e.g., AT&T Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992) (rebuking the Commission for engaging in an "administrative law shell game" to avoid review of its determinations).

In any event, even on their own terms, AT&T's arguments are wrong. In particular, AT&T's premise is that BellSouth's Application seeks review of the *2004 Order*. *See* AT&T Opp. at 2. On the contrary, as BellSouth explained in its Application, that filing *assumes*, in accord with the Commission's own position — and AT&T's own argument here (at 3) — that the *2004 Order* did *not* finally resolve whether it was equitable to require refunds in this case and, accordingly, that this issue was still open during the subsequent proceedings before the Bureau. BellSouth's Application thus makes plain that it seeks review "of the ruling embedded in [the Bureau] order that refunds are warranted in the circumstances of this proceeding." Application at 3; *see id.* at 6 ("BellSouth is seeking Commission review of the Bureau's decision"). It is that *Bureau* decision that BellSouth is challenging here, not, as AT&T would have it, the *2004 Order* of the Commission. *See* AT&T Opp. at 2 (ignoring BellSouth's express statements on this point). Indeed, as noted, it is only because the Commission and AT&T have

claimed that the *2004 Order* did not finally resolve these equitable issues, *see, e.g.*, FCC D.C. Cir. Br. at 39, that this Application is necessary.

For the same reasons, BellSouth's Application is not an untimely petition for reconsideration of the Commission's *2004 Order*. BellSouth is not seeking reconsideration of that order. Nor was there any need to do so. Either (as BellSouth believes) that order resolved this equitable issue, in which case the issue is properly before the D.C. Circuit now, or (as the Commission has argued) it did not do so, in which case AT&T itself concedes that reconsideration of that order would not be necessary or even appropriate. *See* AT&T Opp. at 2 n.3 (reconsideration proper only as to issues on which the Commission has taken action).

Finally, AT&T briefly contends that the Commission has already "considered and rejected," *id.* at 4-5, BellSouth's arguments as to why it is inequitable to require refunds. That contention is, to say the least, perplexing. AT&T never explains how its suggestion that the Commission has fully considered these issues is consistent with its simultaneous claim, made just a page earlier, that the *2004 Order* "did not, in fact, address whether ordering refunds for BellSouth's failure to apply add-back in its 1993 and 1994 tariffs is equitable." *Id.* at 3. No such explanation is possible. Again, either the Commission addressed this issue and resolved it already, in which case judicial review is proper in the pending proceeding, or it did not do so, in which case the Commission has conceded that BellSouth can raise this issue now.

II. AT&T'S SUBSTANTIVE DEFENSE OF REFUNDS LACKS MERIT

AT&T also briefly addresses the merits of BellSouth's arguments as to why it is inequitable to require refunds here. None of its arguments holds water.

AT&T first claims that refunds would not provide it with a windfall because it did not pass on to its end-users any added costs associated with LECs' decisions not to use the add-back methodology in 1993 and 1994. That assertion is wrong. In fact, in the very order that AT&T

cites, the Commission explained that, "[o]n May 17, 1993, AT&T announced revisions to its price cap indices effective July 1, 1993, reflecting the LECs' proposed changes in access prices and exogenous cost changes AT&T itself experienced." Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, *AT&T Communications Tariff F.C.C. Nos. 1 and 2*, 8 FCC Rcd 6227, 6227, ¶ 2 (1993). In other words, under the price-cap plan that applied to AT&T at the time, the net changes in access charges proposed by the LECs in their 1993 annual access tariffs were passed on to consumers through increases in AT&T's rates. *See id.* And, contrary to AT&T's suggestion, the fact that the Commission has exceeded the statutory deadline by more than a decade has directly contributed to the equitable concerns here. That is so because the Commission's failure to adhere to Congress's timetable has rendered it impossible to provide any benefit to the only parties that were even arguably harmed by BellSouth's add-back decisions — AT&T's end-user customers at the time.

Moreover, even if there were a factual dispute as to whether AT&T passed on any added costs (and thus whether AT&T was injured by BellSouth's decision not to use add-back), that dispute would be central to the equities of requiring refunds and should be investigated before refunds are required. The Bureau, however, has nowhere sought to resolve that issue in these dockets. That failure by itself warrants granting this Application and requiring such a factual determination before concluding that refunds are warranted.

AT&T also claims that the 1993 order suspending these tariffs provided adequate notice to avoid any equitable concern. *See* AT&T Opp. at 5-6. But AT&T does not even dispute that the 1993 order, which suspended the tariffs of LECs that *did* use add-back as well as those that did not, provided no guidance as to the course of conduct that would avoid liability. Thus, BellSouth could not have known in 1993 which methodology would have precluded refunds. As the D.C. Circuit has made clear, the purpose of the suspension requirement is to apprise a tariff

filer of the Commission's tentative objections to the tariff so that the filer "may realize that the FCC's objections are well taken, or not worth a fight, and it may seek to bring itself within compliance and obviate the whole process." *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992). The Commission's 1993 suspension order was deficient in this respect. It gave BellSouth no hint of which course of action would allow it to come into compliance.[2]

AT&T's assertion that *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996), supports its position is equally misguided. Far from concluding, as AT&T suggests, that the Commission provided adequate notice in 1993 to impose liability for 1993 and 1994 tariffs, *see* AT&T Opp. at 6, the Court there emphasized that the 1996 add-back order was "prospective" only and thus did not affect the 1993 and 1994 tariffs. 79 F.3d at 1207. It was precisely because the Commission's order "properly decided to implement the [add-back] rule prospectively" that the D.C. Circuit found it lawful. *Id.* at 1207-08. Thus, far from aiding AT&T, the D.C. Circuit's decision confirms that a retrospective remedy of the kind at issue here would raise significant equitable concerns — concerns that the Commission "properly" avoided in 1996, but that are now front and center.

CONCLUSION

The Commission should grant BellSouth's Application for Review.

---

[2] In a footnote, AT&T seeks to second-guess the D.C. Circuit's analysis on this issue, *see* AT&T Opp. at 6 n.8, but it is the federal court's understanding, not AT&T's, that is controlling here. In any event, even on its own terms, AT&T's argument does not explain how it is *equitable* to require refunds when *ex ante* BellSouth had no knowledge of how to conform its actions to the Commission's interpretation of the law and thus avoid liability

Respectfully submitted,

/s/

MARK L. EVANS
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Telecommunications, Inc.

September 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of September 2005, I caused a copy of the foregoing Reply in Support of Application for Review of Bureau Order to be served upon each of the parties on the attached service list by first-class mail, postage prepaid.

/s/
David M. Burke

SERVICE LIST

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Tamara L. Preiss
Chief, Policy Pricing Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A225
Washington, D.C. 20554

UNITED STATES OF AMERICA

Catherine G. O'Sullivan
Robert J. Wiggers
Robert B. Nicholson
U.S. Department of Justice
Antitrust Division – Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

AT&T CORP.

Leonard J. Cali
Lawrence J. Lafaro
July Sello
AT&T Corp.
Room 3A229
One AT&T Way
Bedminster, NJ 07921

David L. Lawson
Christopher T. Shenk
Nirali D. Patel
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

QWEST CORPORATION

Robert B. McKenna
Qwest Corporation
607 14th Street, N.W., Suite 950
Washington, D.C. 20005

SBC COMMUNICATIONS INC.

James D. Ellis
Paul K. Mancini
SBC Communications Inc.
175 East Houston
San Antonio, Texas 78205

Gary L. Phillips
Davida M. Grant
SBC Communications Inc.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005

VERIZON TELEPHONE COMPANIES

Michael E. Glover
Edward Shakin
Verizon
1515 North Courthouse Road, Suite 500
Arlington, Virginia 22201